No. 16400

United States
Court of Appeals
For the Ninth Circuit

ELSIE SUMMERS,
Plaintiff-Appellant,

Plaintiff-Appellant,

vs.

WALLACE HOSPITAL, PAUL L. ELLIS, HUBERT E. BONEBRAKE and LEWIS B. HUNTER, a co-partnership, and HUBERT E. BONEBRAKE, M. D., Individually,

Defendants-Respondents.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court of Idaho
Northern Division

JAMES W. INGALLS,
residing at Coeur d'Alene, Idaho

DOEPKER & HENNESSEY,
residing at Butte, Montana

For Appellant

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SUMMARY OF REPLY

The appellee argues that the decision of the Supreme Court of the State of Idaho must be applied and that therefore the Statute of Limitations begins to run at the time of the original injury.

It is the position of the appellant that this Court is not bound by the decision of the State Court except as to the precise question presented in that Court and that plain-

tiff here is entitled to recover upon either the rule of continuing treatment or the discovery rule which rules were not applied by the Trial Court.

ARGUMENT

The case of Trimming vs. Howard, 52 Ida 412, 16 Pac 2d 661, was an action against the physician for an injury upon his patient based upon breach of contract and fraudulent representation. The question presented was whether the action was governed on the Statute of Limitations upon personal injury, breach of contract or fraudulent representation. The Idaho Court found that the action was based upon personal injury. The Trimming case is only a precedent for the principle that an action in malpractice is governed by the Statute of Limitations on tort.

The case does not disclose when the injury was *discovered* or whether or not the plaintiff has been under the continuing care of the physician.

Apparently the theories propounded in this matter were not before the Idaho Court as they were not discussed by it.

The decision of the Idaho Court relies strongly upon the case of Gum vs. Allen, 119 C.A. 293, 6 Pac 2d 311, which was expressly overruled by the California Court in Huysman vs. Kirsch, 57 Pac 2d 908, at page 912. The Idaho Court therefore, adopted the prevailing rule at the time of the decision. The Idaho Court has not had an opportunity to change the rule and to adopt the modern rule as no case upon the precise point involved here has been presented to it for decision.

This Court in Moore vs. Tremelling, 100 Fed 2d 39, (C.A. 9) did not feel compelled to follow the decision of the Idaho Court in Trimming vs. Howard, supra:

"A decision of the State Court must be on the precise point in controversy in the Federal Court to have biding effect as a precedent therein."

35 C.J.S., Sec 176, p 1260

The opinion of a State Court of last resort, construing a state statute, is conclusive on the Federal Courts only to the extent of the precise question decided.

"The learned Judge, however, deemed himself precluded from the right to exercise an independent judgment as to the meaning of the Statute, because he was under obligation to follow the interpretation of the Statute by the Supreme Court of Tennessee in the case of Railroad vs. Dies, 98 Tenn 655 41 S.W. 860 and accordingly instructed the jury that the running of an engine backward was a violation of the Statute.

"Neither the case of Railroad vs. Dies, nor any other Tennessee case, has ever involved the precise question presented by the instruction, denied or required the Tennessee court to decide that the Statute was violated whenever an engine was run backward without regard to the circumstances.

"We recognize the duty of following the construction placed upon the State Statute by the highest Court of the state.

"But no such broad question was involved, and the actual decision was put upon the ground that the company had, by running its engine backwards at night, without a headlight, disabled itself from complying with that part of the statute requiring an effective lookout ahead. The opinion as a construction of the Statute is authoritative to the extent of the precise question

decided and no farther. *Nothing more was necessary to the determination of the rights of the parties to that controversy.*"

(emphasis supplied)

Southern Railway Co. vs. Simpson
131 Fed Reporter 705

"Even if the Court was dealing in these cases with demands rejected by an employer or the industrial commission before the new acts became effective, the cases are not determinative of the issue at bar, because they are only authoritative to the extent of the precise question decided and no further."

Philadelphia National Bank vs. Raff
76 Fed 2d 843

"Even if we were bound by the Virginia decisions in a case of this character, we would follow our own decisions as laying down the applicable law, in the absence of a Virginia decision deciding the exact question to the contrary."

Bodenheimer vs. Confederate Memorial Association

68 Fed 2d 507

"It is the duty of the Federal Courts in suits brought in or removed to the District Courts to decide for themselves all relevant questions of state law, and while they will follow the decisions of State Courts as to interpretation of a state statute, we do not think that the case of Gilseth vs. Risty so clearly or decisively passed upon the question here involved as to control our decisions."

Risty vs. Chicago R.I. & P. Railroad Co.

70 Law Ed 650

Where the precise question has not been presented to the highest State Court for decision, the Federal Courts will adapt their own interpretation of the law following the rule that appeals best to its sense of justice and right:

Hagen & Cushing Co. vs. Washington Water Power Co.

99 Fed 2d 614

Cooney vs. Cooper, 143 Fed 2d 312

"The question presented by the motion is interesting. It is novel also, because the high courts of California have not been called upon to determine it. So, if there were a conflict between decisions elsewhere, we might, even in the absence of Erie R. Co. vs. Tompkins, choose to follow one group of decisions rather than the other, — following the one that appeals more to our sense of justice and right."

Katakoa vs. May Department Stores

28 Fed Supp 3 at page 5

"Where the law has not been settled in the State Courts, it is the right and duty of the Federal Court to exercise their own judgment and they properly claim the right to adopt their own interpretation of the law applicable to the particular case."

Burgess vs. Seligman, 107 U.S. 541

27 Law Ed 359 at 365

RESTRICTION OF EVIDENCE

It is apparent that the Court in Tessier vs. U.S., 156 Fed Supp 32, was applying the original injury theory.

Under the original injury theory each repeated act of negligence would give rise to a new cause of action and all acts of negligence which occurred prior to the two year period would not be compensable.

The cases cited by appellants in their original brief refer to continuing negligence or a tolling of the Statute; if these Courts restricted the evidence and recovery to acts of negligence occurring within the Statute of Limitations, there would be no need to apply the continuing negligence theory or to hold that the treatment was not complete until the removal of the foreign object, and it could not be said that the Statute was tolled until discovery or the treatment terminated.

CONCLUSION

The Supreme Court of the State of Idaho has not acted upon the precise question before the Court in this case. It did not examine the discovery rule or continuing negligence rule and reject them, but chose to follow the rule as it then existed in California as pronounced by Gum vs. Allen, supra, now overruled.

There being no decision of the Supreme Court of Idaho upon the precise question here presented, the Court may adopt the rule best founded upon justice and right.

Justice will not bar a cause of action until the injured party has had an opportunity to discover the wrong.

Respectfully submitted, this 30th day of October, 1959.

James W. Ingalls

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Service of the above and foregoing Reply Brief of Appellant is hereby admitted and copy is received this..... day of....., 1959.

HAWKINS & MILLER

By.....
Attorneys for Defendants and Appellees